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RESPONSE TO PROFESSOR MARSHALL COHEN

by
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Professor Cohen has given us a clear, sensible and subtle essay on civil disobedience and there is only one aspect of his analysis with which I shall want to take issue. I would also wish to make some comments from the standpoint of a lawyer and perhaps particularly from the perspective of a criminal and constitutional lawyer.

First I want to agree emphatically with Professor Cohen (and with Ronald Dworkin who has also made this point)¹ that the concept of fidelity to law would be vulgarized and made distortingly simple if we understood it as referring to an obligation not to question the decision of a court, even the Supreme Court. Such a position would involve the error of failing to distinguish between the concept of a legal system and the concept of authority within the system. The court is certainly established by the norms of the system as the proper authoritative organ to make decisions which legally bind the parties but to acknowledge this is very different from saying that the court is an infallible, oracular spokesman for correct or best statements of the law. To assert this would, indeed, be contrary to the traditions and practices of lawyers who are constantly arguing in the courts and in the classrooms that the Supreme Court was wrong when it came to one decision or another. The position which Professor Cohen properly attacks is perhaps a confused legacy of the realist movement in American jurisprudence. The realists were in the habit of talking about the law more in terms of what judges do in deciding cases than in terms of rules and principles. But even the realists would have said that the law on a particular point is a prediction of what a court will decide tomorrow rather than a record of what it decided yesterday. Once we look upon the law more illuminatingly as a body of rules and principles, as a process of reasoning and argument, the correct position is even more apparent. Fidelity to law requires a constant reexamination of decisions in terms of rules and principles rather than a slavish genuflexion to the court's latest pronouncement.

There is of course an important difference between arguing that the court's decision was wrong in law and asserting the reservation of a privilege to refuse to comply. Professor Dworkin has argued (and I understand Professor Cohen to be agreeing with him) that the authoritative nature of the court within the system is an important reason which should incline the citizen in the direction of compliance even if he should believe the court to be wrong. But both these writers would go on to assert that it is not always a decisive reason. A strong moral position against the implications of the decision may be a reason for disobedience and this would be relevantly and significantly supported by the added conten-

RESPONSE TO PROFESSOR MARSHALL COHEN

tion that the court's decision was wrong in law. This is a position which I do not think is inconsistent with a lawyer's inclination to support the rule of law. The rule of law cannot live with the proposition that anyone may have a privilege to disobey when even compliance would be inconvenient or whenever he disagrees with the policy judgment implicit in the law. But it is able to survive alongside the position that there is a moral justification for disobedience when it is in terms of an appeal to conscience.²

If civil disobedience can sometimes, perhaps often in the United States, be grounded in a position which partakes both of moral claims and legal claims, what practical lesson is there for law enforcement officers and judges? At the least, as Ronald Dworkin has argued,³ we may suggest that the motivation, the moral positions and arguments that underlie the disobedience are perfectly proper matters to be considered by enforcement officials in exercising the discretionary function of deciding whether to prosecute or not and by judges in determining what sentence to hand down if a conviction ensues. I would go further and suggest, as I have done elsewhere,⁴ that it is conceivably proper, though attended with some difficulties, for the courts to hold that a defendant's reasonable belief in the unconstitutionality of a statute under which he is prosecuted might in some cases be recognized as a defense leading to an acquittal. The question of whether the statute is constitutional is not, after all, the same question as whether the defendant is a guilty person deserving of punishment. Guilt in criminal law has always included elements which go beyond the doing of a prohibited act. The prosecution must show *mens rea* or guilty mind in the accused and *mens rea* is displaced by a variety of possible justifying circumstances. The belief that the statute which he apparently violated was unconstitutional might be regarded as a justifying circumstance without any strain on classical principles of criminal law. The limits of such a doctrine would certainly be narrow and would embrace only a small number of civil disobedience cases and perhaps only those which Professor Cohen has suggested should not be thought of as typical instances of civil disobedience at all. Cases of "indirect" disobedience would not be touched at all. And even where the defense was *prima facie* appropriate, as where the defendant asserted that he believed the statute which he violated to be unconstitutional, there would be a question as to whether a court could continue to regard the belief as reasonable once it ran contrary to an explicit decision of the Supreme Court on the point at issue.

Professor Cohen has suggested that it is perfectly consistent with the practice of civil disobedience for the defendant in such a case to claim in his defense when prosecuted that the law under which he is charged is unconstitutional. I agree completely but there is a more difficult question here which ought to be considered. The defendant's attorney may wish to raise matters which do not go to the constitutionality of the law in question but are rather "technical" arguments e.g. that

GRAHAM HUGHES

certain testimony is inadmissible under the laws of evidence or that a judge was in error in ruling against the defendant's motion to discover part of the prosecution's case. Is it consistent with a posture of civil disobedience to raise such points? Does the civil disobedient have an obligation to renounce all defenses and arguments of a legal nature other than an attack on the constitutionality of the law under which he is indicted? This question was raised by some in connection with the trial of Dr. Spock where issues of constitutionality were raised by the defense alongside a number of other 'technical' defenses.

It certainly is consistent with fidelity to law in the broad sense to raise defenses which are generally proper in a trial. But the question here of course is whether it is consistent with the appeal to conscience which the disobedient is asserting. Perhaps here we must distinguish between a whole range of possibilities. At the one extreme it would clearly eradicate all elements of appeal to conscience if the defendant at his trial were to exercise his right to stand mute and put the prosecution to its burden of proof and then argue that they had simply failed to adduce sufficient evidence for a conviction. The notion of an appeal to conscience would seem to include of necessity at least the absence of a denial that the act was done by the accused and some positive proclamation of the reasons for doing it. If a proclamation of the reasons for doing the act is to be included then this would seem to entail an admission that the accused did the act. The necessity for such an admission does not mandate a formal guilty plea, for the procedural context of a guilty plea may deprive the defendant of a forum for making his appeal to conscience, but it is certainly inconsistent with any defense or objection which avoids the opportunity to justify the conduct in question.

The necessity of not denying the act does not however entail the abandonment of all technical objections. A defendant who is a civil disobedient may surely assert, consistently with his posture of appeal to conscience, that the prosecution should present its case in a lawful and proper manner. For, if he is willing to be convicted, this is only provided that the conviction be according to law. Part of what he insists upon in his appeal to conscience is that the state should behave in a lawful and constitutional manner. There is of course the risk (if that is the right word) that the successful raising of an objection to the prosecution's procedures may be sufficiently decisive to result in an acquittal. Here indeed there may be a choice to be made, for the defendant may take the view that the value to be preserved by holding the prosecution to full legal propriety in its presentation of the case against him is outweighed by the added strength that his appeal to conscience will gain from conviction and submission to punishment. But the contrary choice, though it may have the practical outcome of diluting the strength of the appeal to conscience, is not irreconcilable with the initial posture of civil disobedience.

RESPONSE TO PROFESSOR MARSHALL COHEN

Professor Cohen has expressly taken issue with what I have written on an earlier occasion and here I continue to some extent to disagree with him. In his text, with elaboration in a footnote, Professor Cohen writes:

"It has been suggested that when the courts invoke the 'political question' doctrine and refuse to adjudicate the issues the disobedient wishes to raise, their action is tantamount to finding that the executive is legally free to perform these very actions. But it is far more plausible to argue that when they invoke this doctrine they assume a wholly agnostic position on the issues involved and simply enforce as law the determinations of the political branches."⁵ The weakness of Professor Cohen's position here seems to be revealed in the curious paradox involved in the last sentence quoted. I do not see how the courts can be said to "enforce as law the determinations of the political branches" and at the same time be said to take "a wholly agnostic position." The ruling that the action of the executive cannot be challenged in a legal forum with its implicit corollary that the mechanisms of law enforcement may be properly used to enforce the executive determination, is too much charged with positive consequences to be dismissed in this way.

The point is that a decision of the Supreme Court that an issue is not justiciable because it involves a political question is itself a decision of a point of law about the jurisdiction of the Court. As such it amounts to a ruling that no tribunal exists which has the legal power in the instant case to declare the act of the executive unlawful. This certainly has a less affirmative impact than a procedure by which the court took jurisdiction of the case and interpreted the substantive provision of the constitution in the executive's favor. But it does at the least mean that in the instant case the executive has a legal privilege to act as it has done in the bare sense that no institution has the legal capacity to declare its action unlawful.

I must be careful to insist here that I am not falling into the error of arguing that a legal duty cannot exist in the absence of enforceability. Lawyers are very familiar with situations where a duty is not directly enforceable against the one who was in breach but yet remains significant for practical purposes of attaching liability vicariously to others. But in the political question area the issue is not one of enforceability but rather of justiciability. A less rarified example from another field may serve to make the point. If, X who is domiciled in New Jersey is run over in Newark by an automobile driven by Y, also domiciled in New Jersey there is no way at all in which X can maintain an action against Y in the courts of New York State. Does this mean that under the law of New York Y did not commit a breach of legal duty when he ran down X? For a lawyer the only sensible answer to this question must be in the affirmative. An application of the political question doctrine, though on a much more exotic plane, has the same juridical significance. It is a holding to the effect that no adjudicative tribunal has the power to interpret the limits

GRAHAM HUGHES

of executive power in a given area, carrying with it the implication that challenges to such power can only be made in the political arena.

Professor Cohen seeks to avoid this conclusion by arguing that the judgment that a legal duty has been breached "is by no means the exclusive prerogative of the courts." He suggests that "the President, the Congress, and even the public may, and often must, make such judgments."⁶ It is perhaps here that the heart of the disagreement between Professor Cohen and myself emerges. As a lawyer I am uncomfortable with a usage which can refer to a judgment as legal in the absence of any norm which can be taken to characterize the judgment as authoritative. It is of course true that individuals can make legal judgments which are not in themselves authoritative but the notion of legal judgment here is a derivative one which takes color from the existence of *some* institution which is empowered to make an authoritative judgment on the issue. So I may make a legal judgment that the Supreme Court has been wrong in some of its decisions which invoke the political question doctrine. I would then simply be disagreeing with the Court's interpretation of the law of the political question doctrine. But it would not make sense for me to contend that while I do not question the application the political question doctrine by the Court I still want to argue that the action of the executive is in the *some* sense illegal. Another way of putting this is to say that any argument I may wish to make asserting the illegality of the executive's action is essentially dependent on a prior argument that the court was mistaken in its application of the political question doctrine, and is, therefore, a concession that the concept of illegality is dependent on locating an authoritative tribunal which, under the law, ought to rule on the question. If Professor Cohen could concede this much, then perhaps we are not after all in disagreement.

1. Dworkin, *Civil Disobedience, THE CASE AGAINST PROSECUTION*, New York Review of Books, Vol. X, No. 11, June 6, 1968.

2. See Wasserstrom, *THE OBLIGATION TO OBEY THE LAW*, 10 U.C. L.A. Law Review 780 (1963).

3. Dworkin, *OP. CIT. SUPRA* n. 1.

4. Hughes, *CIVIL DISOBEDIENCE AND THE POLITICAL QUESTION DOCTRINE*, 43 N.Y.U. Law Rev. 1 (1968).

5. *SUPRA*

6. *SUPRA*